IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GRANT STREET GROUP, INC.
a Pennsylvania corporation,

Plaintiff,

v.

D & T VENTURES, LLC; PACIFIC BLUE SOFTWARE, INC; and WEST FLORIDA BUSINESS SYSTEMS, INC.,

Defendants.

Civil Action No. 10-1095
Judge Donetta W. Ambrose

BRIEF IN SUPPORT OF MOTION TO
DISMISS FOR LACK OF PERSONAL JURISDICTION AND PERSONAL SERVICE

Defendant Pacific Blue Software, Inc. ("Pacific Blue" or "Defendant") move to dismiss all claims for lack of personal jurisdiction and personal service. Pacific Blue submits this Motion to Dismiss notwithstanding its pending Motion to Set Aside the Entry of Default ("Motion to Set Aside") currently before the Court. [See D.E. at 33.] Plaintiff Grant Street Group, Inc. ("Grant Street Group") asserted in its Opposition to Pacific Blue's Motion to Set Aside that Pacific Blue has waived its Rule 12 defenses by seeking to set aside the entry of default under Rules 55 and 60. [See D.E. 44 at 16.] The E.D. Pennsylvania has held otherwise, allowing a Rule 12 motion after a default judgment had been lifted. See U.S. v. Marple Comm. Record, 335 F. Supp. 95, 101 (E.D. Pa. 1971). "[T]he defense was raised in a timely manner since the Order that lifted the default judgment allowed the defendant thirty days in which to answer. The defense, having been properly and reasonably raised, was ripe for an application to have it determined pursuant to Rule 12(d)." Id.

There is, however, contrary authority outside of the Third Circuit Court of Appeals. See, e.g., O'Brien v. R.J. O'Brien & Ass'n., 998 F.2d 1394, 1399 (7th Cir. 1993); Bavouset v. Shaw's of San Fran., 43 F.R.D. 296, (S.D. Tex. 1967). However, since Plaintiff asserted waiver, Pacific Blue is filing this Motion to Dismiss out of an abundance of caution.

Assuming *arguendo* that the Court finds Pacific Blue's Motion to Set Aside qualifies as a Rule 12 motion, amendments to Rule 12 motions are permitted prior to the Court making a ruling. "[T]he waiver rules of Rule 12(h) do not preclude a defendant from adding new grounds to a previously-filed motion to dismiss before that motion is ruled upon." Seal v. Riverside Fed. Savings Bank, 825 F.Supp. 686, 693 n. 10 (E.D. Pa. 1993); see also MacNeil v. Whittemore, 254 F.2d 820, 821 (2d Cir. 1958) ("[Rule 12(h)] does not in any way prevent a judge in his discretion from permitting a party to expand the grounds of motion well in advance of a hearing."); Guccione v. Flynt, 617 F.Supp. 917, 918 (S.D.N.Y. 1985) (no waiver where defendant first raised issue of lack of personal jurisdiction in a January 16, 1984 motion to dismiss, after having separately submitted another motion to dismiss on December 12, 1983, because new ground was raised shortly after the first motion and before the court ruled on that motion); Sunrise Toyota, Ltd v. Toyota Motor Co., 55 FRD 519 (S.D.N.Y. 1972), (no waiver where motions, submitted in separate papers, were both before the court well before the hearing); see generally 5A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure § 1389 (1990). "Here, where defendant raised the new ground for dismissal in due time for the court to consider both motions simultaneously, and plaintiff has had adequate opportunity to respond to the new ground, there is no concern of piecemeal motions practice, and no rights of plaintiff are threatened." Seal, 825 F.Supp. at 693 n. 10. Moreover, Pacific Blue specifically reserved the right to file a Rule 12 motion in its Motion to Set Aside the Default. [D.E. 33 at 1 n. 1].

As set forth below, Pacific Blue does not have sufficient contacts with Pennsylvania to subject it to general or specific jurisdiction in the Western District of Pennsylvania. Further, Plaintiff failed to meet the requirements for personal service on Pacific Blue. Pursuant to Rule 12(b)(2) and (5) of the Federal Rules of Civil Procedure, Pacific Blue respectfully requests this Court to dismiss the claims against it.

I. BACKGROUND

A. Pacific Blue

Pacific Blue incorporated in Florida in 2003, and is a consultant-owned software development company committed to helping tax collectors, such as municipalities, manage property tax processing with Defendant's innovative tax system products. Pacific Blue offers systems for the management of different aspects of tax processing and/or collecting. See generally, Pacific Blue Software, Inc., http://www.pacificbluesoftware.com (last visited Feb. 3, 2011).

Plaintiff alleges that Pacific Blue infringes United States Patent No. 7,523,063 (the " '063 Patent"). [See D.E. 1, Complaint]. Plaintiff asserts that the '063 Patent claims cover Defendant's products and/or services offered to governmental agencies. Id. Plaintiff commenced this action pursuant to the '063 Patent and seeks injunctive relief and damages. Id.

As the Court will note, all of the alleged infringing activities have physically occurred in Florida. The alleged infringing activities involve Manatee County, Florida purportedly selling delinquent tax certificates for Florida real property located within its own county. [See D.E. 1, Complaint at ¶¶ 14-16]. As reflected in the Complaint, none of the activities at issue in the Complaint nor any of Defendant's business activities generally occur in Pennsylvania. [See D.E. 1, Complaint at ¶¶ 3, 14-16].

B. Jurisdiction Pled in Complaint

On August 20, 2010, Plaintiff filed a Complaint in the Western District of Pennsylvania against Defendants D&T Ventures, LLC, Pacific Blue and West Florida Business Solutions, Inc. (collectively "Defendants"). In the Complaint, Plaintiff made no attempt to support personal jurisdiction over Pacific Blue. Plaintiff only pled personal jurisdiction through vague allegations based only on "information and belief." See id. at ¶ 6. Rather than providing a factual basis for jurisdiction, Plaintiff merely asserted a conclusory allegation that Pacific Blue has sufficient contacts with Pennsylvania. Paragraph 6 of the Complaint provides, in part,

> Upon information and belief, Defendants each have minimum contacts with the Western District of Pennsylvania such that this venue is a fair and reasonable one. Defendants have each committed such purposeful acts and/or transactions in Pennsylvania that they reasonably knew and/or expected that they could be hailed into a court as a future consequence of such activity. Upon information and belief Defendants have transacted and, at the time of the filing of this Complaint, are transacting business within the Western District of Pennsylvania....

[D.E. 1, Complaint at ¶ 6].

As is implicit within Plaintiff's bare bones assertion of jurisdiction in the Complaint, there is no factual basis to support jurisdiction over Pacific Blue. Pacific Blue does not have a business presence in Pennsylvania nor has it, in any meaningful way, availed itself to or done any business in Pennsylvania. Pacific Blue is a Florida corporation that has its only corporate office in the state of Florida. Furthermore, Pacific Blue;

- does not have any offices, locations, employees, or other presence or residence outside of the State of Florida;
- is not incorporated or registered to do business in any other state other than the State of Florida;
- does not own nor possess any real property outside of the State of Florida;
- has no employees in Pennsylvania;

- utilizes no vendors in Pennsylvania;
- has no clients in Pennsylvania; and
- does not advertise in any outlets in Pennsylvania nor attends or exhibits in any trade shows in Pennsylvania.

See Todd Randa Declaration at ¶ 4-12 (attached hereto as Exhibit "A").

Thus, Plaintiff has no good faith basis for asserting jurisdiction for filing this suit in Pennsylvania.

C. Insufficient Service of Process

As discussed in Pacific Blue's Motion to Set Aside the Default, which is incorporated herein by reference, Plaintiff failed to proper serve the Complaint and Summons under Fed.R.Civ.P. Rule 4. [See D.E. 33]. Rule 4(h)(1) of the Federal Rules of Civil Procedure allows for service (1) in the manner prescribed for individuals under Rule 4(e)(1) or (2) by delivering a copy of the summons and complaint to a corporate officer, managing or general agent, or any other agent authorized by appointment or law to receive service and also by mailing a copy of each to the defendant. Rule 4(e)(1) states that "[a]n individual ... may be served ... by following state law for servi[ce] ... in the state where the district court is located or where service is made ..." Fed.R.Civ.P. 4(e). Pursuant to Pennsylvania Rule of Civil Procedure 403, a nonresident defendant may be served by the following method: "a copy of the process shall be mailed to the defendant by any form of mail *requiring a receipt signed by the defendant or his authorized agent*." See Pa. R. Civ. P. 403 (emphasis added).[1]

Unbeknownst to Pacific Blue, on October 25, 2010, a certified mail envelope addressed to Mr. Todd Randa was delivered to 7320 East Fletcher Ave., Tampa, FL 33637, the address of

[1] Plaintiff appears to concede that the applicable law for purposes of interpreting Fed.R.Civ.P. 4 is Pennsylvania state law. [See D.E. 44, Opposition to Motion to Set Aside at 7 n 3].

Pacific Blue's virtual office. [D.E. 35, Exhibit A, Todd Randa Declaration, at ¶ 8]. The certified mail receipt was signed by Mr. Jonathon Rushnak ("Mr. Rushnak"). [D.E. 40, Exhibit C, Jonathan Rushnak, at ¶ 4]. Mr. Rushnak is not employed by Pacific Blue, is not authorized to accept service on its behalf, and is employed by Office Suites Plus, Inc., an entity that partners with Davinci Virtual LLC, the business that provides Pacific Blue with virtual office services. [D.E. 35, Exhibit A, Todd Randa Declaration, at ¶ 8]. The envelope did not require a direct signature from Mr. Randa because Plaintiff did not check "Restricted Delivery" for the package and did not pay the additional fee for such a delivery. [See D.E. 17-5, Exhibit C]. Such service is insufficient under both Federal and Pennsylvania law. As such, this action should be dismissed for insufficient service of process under Fed.R.Civ.P. 12(b)(5).

II. ARGUMENT

A. This Court Does Not Have Personal Jurisdiction Over Pacific Blue

Federal Rule of Civil Procedure 12(b)(2) permits dismissal of an action where the court lacks the requisite personal jurisdiction over a defendant. A patent owner may only seek enforcement of its patent through an infringement action in a proper forum. Viam Corp. v. Iowa Export-Import Trading Co., 84 F.3d 424, 428 (Fed. Cir. 1996). Plaintiff failed to file in the proper forum in this case.

"[T]he question of personal jurisdiction is not a function of wrongdoing. Rather it is a question of the power of a judicial forum to decide the issues brought before it." Viam, 84 F.3d at 428. It is well established that "[a] federal district court may assert personal jurisdiction over a non-resident of the state in which the court sits to the extent authorized by the law of that state", provided that it does not violate the due process requirement that the non-resident defendant have certain minimum contacts with the forum state. D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94,

102 (3d Cir. 2009); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1565 (Fed. Cir. 1994).

For personal jurisdiction over a non-resident defendant in a patent infringement, Plaintiff must establish (1) that jurisdiction exists under the forum state's long-arm statute, and (2) that the exercise of jurisdiction would be consistent with the requirements of due process. See Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1319 (Fed. Cir. 2005). Pennsylvania's long-arm statute provides for jurisdiction "based on the most minimum contact with th[e] Commonwealth allowed under the Constitution of the United States." 42 Pa.C.S. § 5322(b). Thus, the reach of Pennsylvania's long-arm statute is coextensive with the Due Process Clause of the Fourteenth Amendment. See Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Products Co., 75 F.3d 147, 150 (3d Cir. 1996). Therefore, only the federal constitutional requirements of due process must be analyzed. Barone v. Rich Bros, Interstate Display Fireworks Co., 25 F. 3d 610, 612 (8th Cir. 1994) (citations omitted).

To satisfy federal due process, a plaintiff or non-moving party must demonstrate that "the defendant purposefully established minimum contacts in the forum state." Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Notwithstanding this showing, jurisdiction can still be defeated if the defendant or moving party can show the exercise of jurisdiction is not reasonable. Ashai Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113 (1987); Burger King, 471 U.S. at 477 (defendant is required to illustrate that the exercise of jurisdiction would frustrate the concept of fair play and substantial justice); Beverly Hills, 21 F.3d at 1568 ("[I]f it would be unreasonable for the forum to assert jurisdiction under all the facts and circumstances, then due process requires that jurisdiction be denied.").

The minimum contact requirements may be satisfied in one of two contexts: general personal jurisdiction; or specific personal jurisdiction. Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 n. 8 (1984). There must be a factual basis for asserting either general or specific jurisdiction. “When a defendant raises the defense of the court’s lack of personal jurisdiction, the burden falls upon the plaintiff to come forward with sufficient facts to establish that jurisdiction is proper.” Mellon Bank (East) PSFS, Nat. Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992) (citations omitted); see also, Campbell Pet Co. v. Miale, et al., 542 F.3d 879, 889 (Fed. Cir. 2008) (Federal Circuit places burden on plaintiffs to prove jurisdiction over defendants). As set forth below, Plaintiff has not and cannot meets its burden under general nor specific jurisdiction.

1. General Personal Jurisdiction Is Completely Absent

“General jurisdiction is based upon the defendant’s ‘continuous and systematic’ contacts with the forum and exists even if the plaintiff’s cause of action arises from the defendant’s non-forum related activities.” Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. Pa. 2001)(*quoting* Vetrotex, 75 F.3d at 151 n.3 (3d Cir. 1996)); see also, Viam, 84 F.3d at 428. Plaintiff has failed to allege grounds to support the general personal jurisdiction of this Court over Pacific Blue. The reason for this is apparent: no such grounds exist.

Pacific Blue does not have sufficient contacts with Pennsylvania to subject it to suit in the Western District of Pennsylvania. The declaration of Todd Randa, President and CEO of Pacific Blue, proves that Pacific Blue is a Florida corporation. See Exhibit A, Todd Randa Declaration at ¶¶ 4-12. It has no offices, employees, vendors, or clients in Pennsylvania and it does not advertize in any outlets nor participate in any trade shows in Pennsylvania. Id. Contrary to Plaintiff's allegations, Pacific Blue has not transacted and is not transacting business within the Western District or elsewhere in Pennsylvania. See id.

For these reasons, neither the allegations in the Complaint, nor any other facts, support the exercise of general personal jurisdiction over Pacific Blue.

2. Specific Personal Jurisdiction Is Non-Existent

This Court likewise cannot exercise specific personal jurisdiction over Pacific Blue. For specific jurisdiction to exist, two requirements must be met: (1) purposeful availment by a defendant; and (2) the exercise of jurisdiction must comport with notions of fair play and substantial justice. First, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws." Burger King, 471 U.S. at 475. The application of the "purposeful availment" rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Second, the Court must then determine that "the exercise of jurisdiction 'comports with traditional notions of fair play and substantial justice,' *i.e.*, the defendant 'should reasonably anticipate being hailed into court' in that forum." Toys "R" Us, 318 F.3d 446, 451 (3d Cir. 2003) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). "[S]pecific jurisdiction is present only if the plaintiff's cause of action arises out of a defendant's forum-related activities, such that the defendant should reasonably anticipate being haled into court in that forum." Remick v. Manfredy, 238 F.3d at 255 (citations and internal quotation marks omitted). In patent actions, the forum-related activity or "the situs of the injury is the location, or locations, at which the infringing activity directly impacts on the interests of the patentee." Beverly Hills, at 21 F.3d at 1571.

Plaintiff cannot meet either of the requirements to prove specific jurisdiction over Pacific Blue.

a. Defendant Has Not Purposefully Availled Itself to Anything in Pennsylvania

Under the “minimum contacts” test, a plaintiff must show that the defendant purposely directed his activities at residents of the forum, and that the plaintiff's claim arises from or relates to those activities. Burger King, 471 U.S. at 472. The defendant must have “purposely avail[ed] itself of the privilege of conducting activities within the forum state.” Burger King, 471 U.S. at 475. It is designed to ensure that the defendant is not “hailed into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” Id. at 472 (quoting Hanson, 357 U.S. at 253); America Online, Inc. v. Huang, 106 F.Supp.2d 848, 856 (E.D. Va. 2000). Put differently, the test protects a defendant from having to defend himself in a forum where he should not have anticipated being sued. See World-Wide Volkswagen Corp., 444 U.S. 286, 297 (1979).

As discussed previously, the contacts that Pacific Blue has with Pennsylvania do not meet the "minimum contacts" rule under the most liberal of interpretations. With regard to the “minimum contacts” test, there is no evidence that Pacific Blue purposely directed its activities to residents in Pennsylvania or engaged in the “purposeful availment of the privilege of conducting activities within” Pennsylvania. Pacific Blue's only contact with Pennsylvania was one email from the spouse of a tax collector in Westmore County, PA in 2009, seeking information regarding prices on Pacific Blue's products. See Exhibit A, Todd Randa Declaration at ¶ 18. Pacific Blue did not initiate the contact and no relationship resulted from the inquiry as the tax collector's spouse decided the products were out of their price range. Id. This is the one and only negligible contact with Pennsylvania, which cannot be characterized under any reasonable interpretation as sufficient "minimum contacts" with the forum to satisfy jurisdictional requirements. See Commissariat A L'Energie Atomique, 395 F.3d at 1319. Thus, Pacific Blue does not have the required "minimum contacts" with Pennsylvania for jurisdiction.

Finally, and what is dispositive of the issue of specific personal jurisdiction, the Defendants could not have “reasonably anticipated” being hailed into court in Pennsylvania by doing business in Florida as is alleged in the Complaint. As previously noted, there must be a direct connection between Plaintiff's claims and Defendant's forum-related activities. See Commissariat A L'Energie Atomique., 395 F.3d at 1319. Plaintiff alleges that Pacific Blue has infringed the '063 Patent by its activities related to Manatee County located in the state of Florida. Beverly Hills, at 21 F.3d at 1571. There simply is no connection between those actions and the lawsuit being brought in this Court. As such, Plaintiff’s claims of specific personal jurisdiction fail.

b. Fair Play and Substantial Justice

Assuming *arguendo* that the Plaintiff has established that specific minimum contacts do exist – which is clearly not evident here – these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” Burger King, 471 U.S. at 476. “Thus courts in appropriate cases may evaluate the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” Burger King, 471 U.S. at

476-477 (citations omitted).

In this case, there is no question that litigating this case in Pennsylvania will be a substantial burden on Pacific Blue. Pacific Blue is a Florida corporation with Florida employees and clients and absolutely no connection to Pennsylvania. See Exhibit A, Todd Randa Declaration at ¶¶ 4-12. All possible witnesses with knowledge regarding Pacific Blue's alleged infringing activities reside only in the state of Florida. See id. at ¶ 15.

Plaintiff is registered to do business in Florida and has provided and continues to provide services to clients in Florida. Given that both Pacific Blue and Plaintiff do business in Florida, Florida has a more compelling interest in adjudicating this case. As such, Plaintiff's claims, when prosecuted in Pennsylvania, do not meet the standards of fair play and substantial justice. Thus, they fail.

3. There is No Personal Jurisdiction over Pacific Blue Arising from Its Internet Sites

As the internet is available worldwide, courts have limited personal jurisdiction based upon internet websites to comport with traditional jurisdictional requirements, including "minimum contacts." The mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Toys "R" Us, 318 F.3d at 454; Campbell Pet Co., 542 F.3d at 884. Rather, there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts." Toys "R" Us, 318 F.3d at 454. Here, Pacific Blue's internet website does not provide a basis for personal jurisdiction in Pennsylvania.

When evaluating jurisdiction based solely on the use and availability of an internet site, courts weigh and evaluate "the nature and quality of commercial activity that [the defendant] conducts over the Internet." Spuglio v. Cabaret Lounge, 344 Fed. Appx. 724, 726 (3d Cir. 2009 (citations omitted). In doing so, courts examine the internet activity on a sliding scale. On one end are defendants who actively do business over the Internet and have thereby "purposely availed [themselves] of the privilege of engaging in activity in that state." Toys "R" Us, 318 F.3d at 451. A defendant on this side of the scale typically "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet." Id. (quoting Zippo Mfg Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa 1997)). On the other end of the sliding scale is what the courts have termed a "passive" website. See id. A website, which merely provides information on the internet, is considered a "passive" website. The exercise of personal jurisdiction over such "passive defendants is not proper. Id. "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Id.

Pacific Blue is merely a passive provider of information over the Internet at http://www.pacificbluesoftware.com, which is hosted in Florida. Exhibit A, Todd Randa Declaration at ¶ 13. Nothing can be purchased, ordered or reserved on the website. Id. Viewers can review information regarding offered products, and can request for additional information via an email address or phone number provided on the website. Id. Defendant does not use it in any way to target Pennsylvania residents. Id. Such a site clearly meets the courts' definition of a "passive website." Thus, it is clear, that Pacific Blue is on the side of the sliding scale that provides no basis for personal jurisdiction.

III. ARGUMENT FOR DISMISSAL FOR INSUFFICIENT SERVICE OF PROCESS

B. Pacific Blue Was Not Properly Served

Federal rule of civil procedure 12(b)(5) stipulates dismissal of an action for insufficient service of process. The Summons and Complaint were not properly served on Pacific Blue, and thus, its conduct did not cause the default. Rule 4(h)(1) of the Federal Rules of Civil Procedure allows for service (1) in the manner prescribed for individuals under Rule 4(e)(1) or (2) by delivering a copy of the summons and complaint to a corporate officer, managing or general agent, or any other agent authorized by appointment or law to receive service and also by mailing a copy of each to the defendant. Rule 4(e)(1) states that "[a]n individual ... may be served ... by following state law for servi[ce] ... in the state where the district court is located or where service is made ..." Fed.R.Civ.P. 4(e).

1. Plaintiff failed to meet the requirements for service of an individual under state law.

Plaintiff had three options under Pa.R.Civ.P. 400 *et seq.* to serve an out-of-state defendant: (1) by handing a copy of the complaint and summons in person to a defendant or defendant's authorized agent; (2) by certified mail with restricted delivery directly to defendant's appointed agent for service; or (3) by seeking an order from the Court for substituted delivery. See Pa.R.Civ.P. 400 *et seq.* Plaintiff did none of these.

Plaintiff cites as support of proper service Pa.R.Civ.P. 402. [See D.E. 44 at 7-8]. Plaintiff did not serve Pacific Blue in person and therefore did not meet the requirements of Pa.R.Civ.P. 402.2. [See D.E. 44 at 3-4]. Rule 402.2 specifically requires that a copy of the complaint and summons be "hand[ed]" to a defendant. See Pa.R.Civ.P. 402. Because Plaintiff concedes that it did not serve Pacific Blue in person by "handing a copy to the manager, clerk or other person for the time being in charge of any regular place of business or activity of the association," Pa.R.Civ.P. 402.2 is inapplicable. [See D.E. 44 at 3-4].

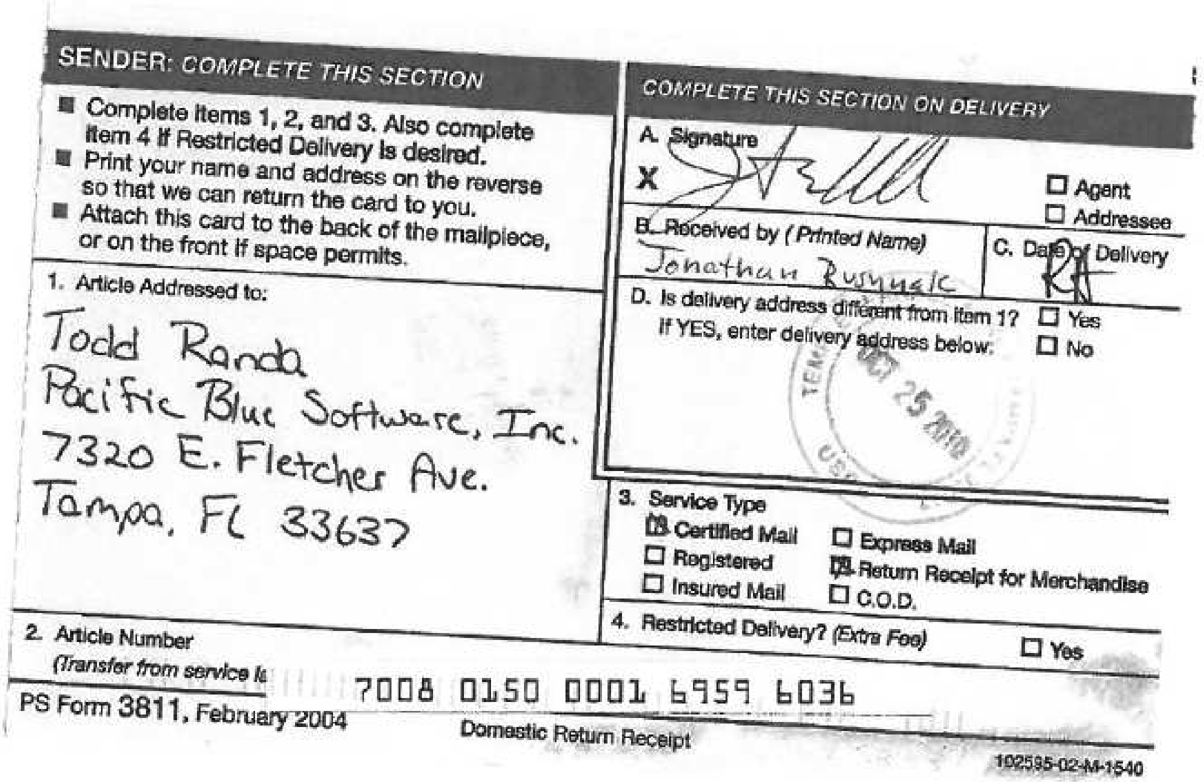
Plaintiff lists eleven purported service attempts on Mr. Randa. [See D.E. 44 at 3-4]. Based upon its failure to serve Mr. Randa personally, Plaintiff improperly concludes that Pacific Blue was avoiding service. As explained in his Declaration, Mr. Randa inadvertently neglected to change the address being listed on the Florida Secretary of State's website for service and is in the process of correcting it now. [D.E. 47 at Exhibit A, Todd Randa Declaration at ¶ 3]. His failure to change the address with the Secretary of State was not intentional. Id. Nonetheless, Mr. Randa's new address is available to the public, and Plaintiff readily obtained it as evidence by its attempted service at that address. [See D.E. 44 at 3]; [see also, D.E. 47 at Exhibit A, Todd Randa Declaration, at ¶ 3]. During many of Plaintiff's failed attempts at service, Mr. Randa was either away from home working or out of the country. [D.E. 47 at Exhibit A, Todd Randa Declaration at ¶ 3]. Most importantly, Mr. Randa never attempted to avoid service. Id.

Since personal service was ineffective, Plaintiff had the option of serving via certified mail *with restricted delivery* under Pa.R.Civ.P. 403. Pursuant to Pennsylvania Rule of Civil Procedure 403, a nonresident defendant may be served by the following method: "a copy of the process shall be mailed to the defendant by any form of mail *requiring a receipt signed by the defendant or his authorized agent.*" Pa. R. Civ. P. 403 (emphasis added). The requirement for a receipt goes beyond ascertaining whether the package arrived at the designated address. As the notation for Pennsylvania Rule 403 states, "[t]he United States Postal Service provides for restricted delivery mail, which can only be delivered to the addressee or his authorized agent. Rule 403 has been drafted to accommodate the Postal Service procedures with respect to restricted delivery."[2] Id.

Pa. R. Civ. Pro. 403 requires "restricted delivery" upon the defendant or an authorized agent. The official note of Pa.R.Civ.P. 403 clarified that service by mail requires plaintiffs to use restricted delivery. "[U]nder Pennsylvania law, service by mail upon an out-of-state individual or corporation is not proper unless it is effected by a form of mail requiring a receipt signed by the defendant or his authorized agent, such as U.S. restricted delivery mail." Chapman v. Homecomings Financial Services, et al., No. 07-4553 2008 WL 1859540, *1 (E.D. Pa. April 25, 2008); see also Del. River Tow, LLC v. Nelson, 382 F.Supp.2d 710, 717-18 (E.D. Pa. 2005); Seldon v. Home Loan Services, Inc., No. 07-4480, 2009 WL 18815, *2 (E.D. Pa. Jan. 26, 2009).

Plaintiff ignored the restricted delivery requirement by failing to check the "Yes" box under Section 4 of the return receipt for "Restricted Delivery." [D.E. 41, Exhibit D, [Ex. C of D.E. 17-5 at 2 and excerpted below.]] The receipt for certified mailing that Plaintiff submitted in support of its purported service is found at page 2 of exhibit C of D.E. 17-5 and is excerpted below.

[2] "[Y]ou might have private or highly classified documents that you require to be seen only by the addressee. Restricted Delivery ensures that your mail is only delivered to the person you specify, or to the person authorized in writing to sign for intended recipient. Mail for minors or persons under guardianship may be delivered to their parents or guardians." [D.E. 43, Exhibit F, U.S. Postal Service Website regarding Restricted Delivery].


SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Todd Randa
Pacific Blue Software, Inc.
7320 E. Fletcher Ave.
Tampa, FL 33637

2. Article Number (Transfer from service la[bel]) 7008 0150 0001 6959 6036

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) Jonathan Rushnak

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

As will be detailed below, the receipt was not signed by Pacific Blue, nor any of its employees, officers or registered agents and was not delivered with the restricted delivery option required by Pa. R. Civ. P. 403 (see box 4 above with the restricted delivery option left unchecked).

Although Plaintiff tendered the above receipt for certified mailing, the receipt was not signed by Pacific Blue. [D.E. 40 at Exhibit C, Jonathan Rushnak Declaration, at ¶¶ 4 and 5]. Rather, it was signed by Jonathan Rushnak, an employee of the entity that provides virtual office services to Pacific Blue. *Id.* Mr. Rushnak is not an employee of Pacific Blue. [D.E. 35 at Exhibit A, Todd Randa Declaration, at ¶ 8]; [see also, D.E. 40 at Exhibit C, Jonathan Rushnak Declaration, at ¶ 5].

Moreover, Plaintiff has not submitted a receipt for certified mail containing a signature of Pacific Blue's authorized agent. Plaintiff and his counsel did have access to the address for Pacific Blue's duly authorized agent for service of process, Mr. Randa, as well as the option for restricted delivery directly to him. Pacific Blue's registered agent in Florida is Mr. Randa, and the service address is 1539 Chepacket Street, Brandon, FL 33511, not 7320 E. Fletcher Avenue, Tampa, the address of Pacific Blue's virtual office. [D.E. 35 at Exhibit A, Todd Randa Declaration]; [see also, D.E. 40 at Exhibit C, Jonathan Rushnak Declaration].

In a similar case, the plaintiff attempted to "serve" an individual with no authority to accept service on behalf of the defendants. Plaintiff asserted that service was proper because the person served was a “manager, clerk or other person for the time being in charge of any regular place of business or activity.” Pa. R. Civ. P. 424(2). However, pursuant to Pennsylvania law, a "person in charge" must be someone who has “a sufficient connection between the person served and the defendant to demonstrate that service was reasonably calculated to give the defendant notice of the action against it.” Cintas Corp. v. Lee's Cleaning Servs., Inc., 700 A.2d 915, 920 (Pa. 1997); see also, Grant Entm't Group, Inc., 988 F.2d 476, 485-86 (3d Cir. 1993) (holding that a receptionist in a building where the defendants were tenants and who was not employed by the defendants did not qualify as a person in charge). Here, Mr. Rushnak, the person served, was not even an employee of Pacific Blue. Rather, he was an employee of an entity that provided virtual office services to Pacific Blue. [D.E. 40 at Exhibit C, Jonathan Rushnak Declaration].

In another analogous case, plaintiff served a receptionist of the defendant with the summons and complaint in the lobby area of the defendant's office. Morgan Stanley & Co., Inc. v. MK Investments, Inc., No. 88-9746, 1989 WL 41354, *1 (E.D. Pa. 1989). The receptionist was not an employee of the defendant, rather she is employed by a securities investment firm located on the same office floor as defendant. Id. The defendant and the investment firm shared the same mailing address and all packages delivered to either the defendant or the other company were left with the receptionist who signed for the package. Id. The defendant argued that the receptionist was not an officer, partner, trustee, manager, clerk, employer or agent of its firm and had never been authorized by defendant to receive process. Id. The court set aside the entry of default on the basis of improper service. Id. Therefore, Plaintiff did not directly and properly serve the Summons and Complaint on Pacific Blue's authorized agent under Pa. R. Civ. P. 403.

2. Plaintiff also failed to serve a corporate office, managing or general agent or an authorized agent.

As discussed above, the person served was not a corporate officer, managing or general agent[3] or any other agent authorized by appointment or law to receive service.[4] Mr. Rushnak was not even an employee of Pacific Blue, much less a corporate officer or agent. [D.E. 35 at Exhibit A, Todd Randa Declaration, at ¶ 8]; [see also, D.E. 40 at Exhibit C, Jonathan Rushnak Declaration, at ¶ 5]. Moreover, Mr. Rushnak had no authority to accept service for Pacific Blue. Id.

To summarize, because Pacific Blue was not served properly, it excusably did not file an Answer to the Complaint and/or file another responsive pleading.

IV. CONCLUSION

Plaintiff's claims against Pacific Blue should be dismissed for lack of personal jurisdiction. Neither Pacific Blue nor Plaintiff's patent infringement claims have any connection whatsoever with Pennsylvania and thus this forum. As such, Pacific Blue respectfully requests this Court grant Pacific Blue's Motion to Dismiss for Lack of Personal Jurisdiction.

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[3] The Third Circuit's definition for what constitutes a "managing or general agent" under Rule 4(h)(1)(B) "depends on a factual analysis of that person's authority within the organization." Gottlieb v. Sandia American Corp., 452 F.2d 510, 513 (3d Cir. 1971). The court further articulated that a managing or general agent will "have broad executive responsibilities and that his relationship will reflect a degree of continuity." Id.

[4] Rule 4(h)(1)(B) does not allow service of process upon corporations by mail as a matter of federal procedure. Taylor v. The Stanley Works, No. 4:01-CV-120, 2002 WL 32058966, *4 (E.D. Tenn. July 16, 2002); Miles v. WTMX Radio Network, No. 02 CV 427, 2002 WL 1359398, *4 (N.D. Ill. June 20, 2002); Amnay v. Del Labs, 117 F.Supp.2d 283, 286-87 (E.D.N.Y. 2000) (Rule 4(h)(1) does not authorize service on corporations via mail). The rule requires personal delivery of the complaint and summons to a corporate officer or agent authorized to receive service on the corporation's behalf. The term "delivering" in Rule 4(h)(1)(B) does not include service by mail. Taylor, 2002 WL 32058966 at *4.

Respectfully submitted,

Dated: February 4, 2011

/s/ Ryan O. Hemminger

Steven M. Reinsel
PA I.D. No. 66808
Ryan O. Hemminger
PA I.D. No. 200809
LEECH TISHMAN FUSCALDO & LAMPL, LLC
525 William Penn Place, 30th Floor
Pittsburg, Pennsylvania 15219
(412) 261-1600
rhemminger@leechtishman.com
SReinsel@LeechTishman.com
Attorneys for Defendant Pacific Blue Software, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notification of filing to the following:

George P. Faines, Esq.
Thomas M. Joseph, Esq.
Grant Street Group, Inc.
1800 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
Email: faines.george@grantstreet.com
Email: tom.joseph@GrantStreet.com
Attorneys for Grant Street Group, Inc.

/s/ Ryan O. Hemminger
Ryan O. Hemminger